I now also agree with Mr. Shankar that the pecuniary or other advantage which is mentioned in the definition of corrupt practice in section 2(2) of the Emergency (Essential Powers) Ordinance No. 22 of 1970 must be taken to mean wrongful or undue gain — something to which a person is not entitled or is not yet entitled or is getting something more than he is lawfully entitled. In short it must be an undue advantage. And if undue advantage is proved then it would be evidence also of ulterior motive and of abuse of power.

In the present case Almac was entitled to have its plans approved after they had been fully processed by the various departments in the Municipality which had anything to do with the processing of the lay-out and the building plans. Even if the 1st accused had not been the Commissioner the plans of Almac would have been approved in the normal course by whoever occupied the chair of Commissioner. Secondly, Almac would be lawfully entitled to the profits which Almac might have made in the housing project. The approval of the plans by the 1st accused would have in no way given to the shareholders of Almac anything more than what they would be lawfully entitled. Therefore when the plans were approved the 1st and 2nd accused derived no pecuniary or other advantage over and above their lawful shares from the profits of Almac.

On the abetment charges against the 2nd accused the evidence adduced is insufficient to establish a case against him. He was a mere shareholder of Almac and as a member of the Building Sub-Committee he and the other members in the Sub-Committee merely acted upon the recommendations of the Municipal Engineer. There is no evidence to connect the 2nd accused with the 1st accused in the sense that he had instigated or conspired or intentionally aided in the commission of any offence by the 1st accused.

The evidence in this case has not reached the high standard of proof which is required in a criminal trial. The performance of one's lawful duty exercised *bona fide* and within the limits of that duty is not a wrong. Both the accused are entitled to an acquittal and I therefore order that they be acquitted and discharged.

Accused acquitted and discharged.

Solicitors: *Shearn Delamore & Co.; Sulaiman C. Navarednam & Co.*

PLAYING CARDS (MALAYSIA) SDN. BHD. v. CHINA MUTUAL NAVIGATION COMPANY LTD.

[O.C.J. (Gunn Chit Tuan J.) May 11, 1979]
[Penang — Civil Suit No. 291 of 1974]

Shipping — Carriage of Goods by Sea — Bill of Lading — Goods not shipped on board vessel — Goods subsequently delivered by another vessel — Whether shippers liable.

In this case a bill of lading was issued for the shipment of goods on board the "S.S. Priam" for delivery to the order of the shippers in Penang. The said goods were not in fact shipped on board the "S.S. Priam" but were later shipped on the "S.S. Peisander" and delivered against the bill of lading. The plaintiffs claimed damages for failure to deliver the goods.

Held: (1) on the pleadings the plaintiff's claim was for non-delivery of goods and this claim could not succeed as the goods were in fact delivered;

(2) the plaintiff's claim for alleged damages for delay was untenable as the court could not disregard the pleadings;

(3) the defendants as shippers had discharged the burden of proving that the goods were never in fact shipped on board the "S.S. Priam" and therefore the defendants were not liable to the plaintiffs for damages.

Cases referred to:-

(1) *Janagi* v. *Ong Boon Kiat* [1971] 2 M.L.J. 196.
(2) *Blay* v. *Pollard and Morris* [1930] 1 K.B. 628, 634.
(3) *Esso Petroleum Ltd. & Anor.* v. *Southport Corporation* [1955] 3 All E.R. 864, 871.
(4) *Sanday* v. *Strath Steamship Co.* (1921) 15 Asp. M.L.C. 280 C.A.; (1920) 26 Com. Cas. 163, affirmed (1921) 125 L.T. 557; 37 T.L.R. 665.
(5) *Bennet and Yoong* v. *John Bacon Ltd.* (1899) 13 T.L.R. 204.
(6) *Thin* v. *Liverpool Brazil and River Plate Steam Navigation Company Ltd.* (1901) 18 T.L.R. 226, 227.
(7) *Grant* v. *Norway* (1851) 10 C.B. 665; 20 L.J. C.P. 93, 98.
(8) *Russo-Chinese Bank* v. *Li Yan Sam* [1910] A.C. 174, 184.
(9) *Leduc* v. *Ward* (1888) 20 Q.B.D. 475, 479; [1886-1890] All E.R. 266, 268.
(10) *Smith, Edwards & Co.* v. *Tregarthen* (1887) 56 L.J.Q.B. 437; 57 L.T. 58.
(11) *Smith v. Bedouin Steam Navigation Company* [1896] A.C. 70, 77.

CIVIL SUIT.

N. Chandran for the plaintiffs.

S. Thillaimuthu for the defendants.

Gunn Chit Tuan J.: A bill of lading bearing No. 41 dated November 21, 1973 (Exhibit D1) was issued in New York, United States of America, by Furness Withy Agencies (U.S.A.), as agents for the master of the defendant's vessel "S.S. Priam" for the shipment of 16 skids of Kraft paperboard on the said vessel from New York for delivery to the order of the shippers, P.L. Thomas Paper & Co. Inc., of New York, at the Port of Penang. The said goods were not in fact shipped on board the said vessel "S.S. Priam" but were later shipped on the vessel "S.S. Peisander" from New York to Penang manifested under bill of lading No. Memo — 1 dated May 7, 1974 to be delivered against the said bill of lading No. 41. The said vessel "S.S. Peisander" arrived at Penang on June 13, 1974 and the said goods were delivered to the plaintiff on June 28, 1974 against the said bill of lading No. 41 duly indorsed by the plaintiff on June 27, 1974. (See the reverse side of Exhibit D1).

On August 16, 1974 the plaintiff, a company in-

corporated in Malaysia and having a place of business in the Mak Mandin Industrial Estate, Butterworth, Province Wellesley, filed this suit against the defendant, a limited company which is the owner of the said vessel "S.S. Priam" and which is carrying on business here through their agents, the Malaysia International Shipping Corporation Berhad, claiming that it was the duty of the defendant by the said bill of lading No. 41 to deliver as contracted the said goods in the said vessel ("S.S. Priam") which was scheduled to arrive at the Port of Penang on the 25th day of December, 1973. The plaintiff also averred that "in breach of the said duty or contract the defendant failed to deliver the consignment or any part thereof", (see paragraph 6 of the statement of claim) as a result of which it has suffered damages.

Before I proceed to consider the arguments of counsel, it must be noted that although it appeared that the law relating to bills of lading which is applicable is the *lex loci contractus* and which in the case of the said bill of lading No. 41 should therefore be the law of the United States of America, yet no submissions were made on this point by either counsel who argued the case on the basis that Malaysian law was applicable. As a result no expert on American law was called by the plaintiff, on whom the onus lay of proving its case, to assist the court to form an opinion upon any point of American law which might arise and be applicable to the case. Be that as it may, I found however that the plaintiff had failed to prove its case against the defendant and dismissed the suit with costs for the reasons stated below.

As for the submissions made, it was firstly contended on behalf of the defendant that the plaintiff had no cause of action at all as it has been averred in the statement of claim that the defendant had failed to deliver the goods or any part thereof which is not the case. The plaintiff's witness (PW1) in his evidence in court said that the goods in question were in fact delivered to the plaintiff on July 29, 1974. Counsel for the defendant pointed out that the plaintiff had therefore departed from its statement of claim which was a claim for damages for non-delivery of goods but the evidence adduced made out a case for damages for alleged delay in delivering the goods. On the pleadings alone I agreed with the contention of counsel for the defendant that the plaintiff's claim for alleged damages for delay was untenable as the court should not disregard the pleadings. Counsel for the defendant quoted and relied on the cases of *Janagi* v. *Ong Boon Kiat*,[1] *Blay* v. *Pollard & Morris*[2] and *Esso Petroleum Co. Ltd. & Anor.* v. *Southport Corporation*.[3]

However, although no application was made to amend the plaintiff's statement of claim to alter it from a claim for damages for non-delivery of goods to a claim for damages for delay in delivering goods, I considered that in the interests of justice the court should consider the various arguments put forward by counsel for both parties on the issue as to whether the defendant, as a shipowner, was liable in this case for damages for delay in delivering the said goods.

Mr. Thillaimuthu, counsel for the defendant, referred to the following paragraph in Vol. 35 of *Halsbury's* Laws of England (3rd Edition) at page 330: —

"472. *Acknowledgment of receipt.* A bill of lading is, in the first instance, an acknowledgment of the receipt of the goods specified therein. Except as against the person actually signing it, it is not conclusive, and may be controverted by evidence showing that the goods were never in fact shipped. A shipowner, therefore, who has not signed the bill of lading is not necessarily bound by the acknowledgment of receipt signed by his agent. The agent has no authority to sign a bill of lading either for goods which have not been shipped, or for a greater quantity of goods than has actually been put on board; and this limitation upon his authority must be taken to be known to all persons into whose hands a bill of lading may come. The shipowner, therefore, is not estopped by the signature of his agent from proving either than the goods stated in the bill of lading to have been shipped were not shipped, or that the quantities specified in the bill of lading are incorrect, and that he has delivered all the goods which were in fact put on board...,"

and pointed out that a shipowner may discharge the burden of proving that the goods were never in fact shipped either directly by showing that a mistake has been made in the bill of lading or indirectly by satisfying the tribunal that none of the goods were lost or stolen after he received them and that he has delivered all that he received (*Sanday* v. *Strath Steamship Co.*;[4] *Bennett and Young* v. *John Bacon Ltd.*[5]).

Various other authorities were also referred to by Mr. Thillaimuthu in support of the defendant's case. But, with respect, I think it is necessary to refer to only two of them. Firstly, there was the case of *Thin* v. *Liverpool, Brazil and River Plate Steam Navigation Company (Limited)*.[6] In that case it was held that the bill of lading was the contract between the shipowner and the holder of the bill. But the court held further that it was a contract dealing with goods loaded and *not* with goods which never came on board. Mr. Justice Wills in his judgment said as follows: —

"Supposing that the stipulations were parts of the effective bill of lading, they were beyond the authority of the master to make, not because they contravened any secret instructions of which the bill of lading holder had no notice, but because they contravened thoroughly established law by affecting to make the ship liable for goods never shipped."

The other case which need be referred to is the case of *Grant* v. *Norway*.[7] In that case, the bill of lading had been signed by the master for ten bales of silk, none of which had ever been shipped; it was held that transferees of the bill of lading, who had given value for it on the faith of the representation contained in it, had no claim against the shipowners for the master had no authority to give the bill of lading for goods which had not been shipped. Jervis C.J. delivering the considered judgment of the court said as follows: —

"It is not contended that the captain had any real authority to sign bills of lading unless the goods had been shipped. Nor can we discover any ground upon which a party taking a bill of lading by indorsement would be justified in assuming that he had authority to sign such bills, whether the goods were on board or not. If, then, from the usage of trade and the general practice of shipmasters, it is generally known that the master derives no such authority from his position as master, the case may be considered as if the party taking the bill of lading had notice of express limitation of the authority, and in that case, undoubtedly, he could not claim to bind the owner by a bill of lading signed when the goods therein were never shipped."

I would pause here to note that the case of *Grant* v. *Norway* was decided more than 100 years ago and has never been overruled and was referred to by the Privy

Council in the case of *Russo-Chinese Bank* v. *Li Yau Sam*[8] without disapproval.

The relevant points made by Mr. Chandran, counsel for the plaintiff, in his submission were briefly as follows. He contended that the defendant had contracted to deliver the goods in question at the Port of Penang on December 25, 1973 and referred to a note from the said Malaysian International Shipping Corporation Berhad, as agents for the defendant, to advise the plaintiff that the goods in question were on board the "S.S. Priam" which was due to arrive from New York on December 23, 1973 (page 9 of the agreed bundle of documents marked 'A'). He also referred to a letter from the said shippers, P.L. Thomas Paper Company Inc., to the plaintiff to inform the latter that they have effected shipment of the goods in question by the said "S.S. Priam" which sailed from New York on November 23, 1973 enroute to Penang (see page 4 of the agreed bundle of documents marked 'A'). After referring to the statement of defence, counsel contended that paragraphs 3 and 4 thereof amounted to admissions by the defendant of the breach pleaded in the abovementioned paragraph 6 of the statement of claim.

Counsel also referred to the following clause 9 in the said bill of lading No. 41 (Exhibit D1): —

"The Carrier or Master, in its or his discretion, at any time and place, whether or not the reason for its or his action or inaction was known at time of receipt of the goods, once or oftener and without notice to Shipper or Consignee

(a) May substitute another ship, whether owned, operated or chartered by the carrier or others or of a different flag, or of, a different type or speed, or whether before, during or after loading the goods or any part thereof, and whether the substituted ship arrives or departs or is scheduled to do so before or after the ship named herein;

(b) May, in case the goods or any part thereof are shut out from the ship named herein or if the loading or the ship is or is likely to be delayed, have the ship proceed without the goods or a part thereof and the goods may be forwarded in whole or in part by any means to or towards the port of discharge at the risk and expense of the goods;

(c) May, if the goods, wherever situated, or any part of them, are damaged or lost or in danger of damage or becoming worthless or subject to changes disapportionate to their value, or have suffered damage or because of the condition of the goods or for any other reason deemed sufficient, take any measures to salve, recondition, recover possession of, sell, return to shipper, hold, store, or otherwise deal with or dispose of the goods or any part of them, or forward the goods or any part of them by subsequent vessel or any means to or toward part of discharge, and all such measures, procedures or acts shall be at the risk and expense of those goods:

(d) May, in case of lack of discharging facilities or a failure to find or identify the goods at the port of discharge or elsewhere, carry the whole or any part of the goods beyond the port of discharge and return the goods in the ship, or forward the goods in whole or in part to the port of discharge by any means, at the risk and expense of the goods; and

(e) May, if there shall be a forced interruption abandonment or frustration of the voyage at the port of loading or elsewhere or because of the need of repair to the ship or of the inability of the ship to promptly prosecute the voyage at the port of loading or elsewhere, substitute another vessel or may forward the goods or any part thereof by any means at the risk and expense of the goods.

The carrier is not required to, and does not undertake to deliver the goods at port of discharge or elsewhere at any particular time or to meet any market or in time for any particular use nor does it undertake that the ship or substitute ship will sail or arrive at any stated or schedule time. The carrier shall not be liable for any loss or damage arising or resulting from delayed or early arrival of the goods or any damage or expense incurred by the shipper or consignee because of any change in date or time of sailing or arriving.

Any under or over carriage shall not be considered a deviation, nor shall it vitiate any of terms of this Bill of Lading. All forwarding shall be in accordance with and in the manner permitted by the terms of this Bill of Lading, including clause 14 thereof."

Mr. Thillaimuthu, counsel for the defendant, had earlier on argued that the said bill of lading was not a contract between the plaintiff and the defendant, but also contended that if the said bill of lading was considered as a contract, then the above-quoted clause 9 of the bill of lading was a complete defence. Mr. Chandran's contention was that the said clause 9 and the other clauses in the bill of lading are applicable in this case only after the goods have been received on board the "S.S. Priam" and not the "S.S. Peisander". He reasoned that as the said goods were never placed on board the "S.S. Priam", the defence could not rely on any of the clauses in the said bill of lading. Here I would pause to say that I did not agree with the earlier contention of counsel for the plaintiff that paragraphs 3 and 4 of the statement of defence, which merely averred that the said goods were not shipped on the "S.S. Priam" but were later on shipped on the "S.S. Peisander", amounted to admission of liability. But I agreed with both counsel that the said bill of lading could not be regarded as a contract between the parties because the said goods were never put on board the "S.S. Priam" and its master in this case therefore had no authority from the shipowner to make a contract of carriage. (See judgment of Lord Esher M.R. in *Leduc* v. *Ward*[9]). It was therefore not necessary for me to consider the effect of clause 9 in the said bill of lading No. 41.

Mr. Chandran, counsel for the plaintiff, also quoted several authorities in support of the plaintiff's case, but with respect, I think it is only necessary to mention two of them. He considered that the case of *Smith, Edwards & Co.* v. *Tregarthen*[10] was very relevant. That was a case in which the master of a vessel had signed a bill of lading for 400 bales of cotton said to be shipped on his vessel. His vessel could only carry 165 bales and he ordered the remaining 235 bales to be carried on another vessel. It was held in an action by the shippers that they were entitled to recover damages against the said master for non-delivery by his vessel. It must however be noted that in that case it was the master of the vessel and not its owner who was sued and held to be liable.

The other case was *Smith* v. *Bedouin Steam Navigation Company.*[11] Mr. Thillaimuthu had earlier on referred to the same case to show that a shipowner is bound to deliver the full amount of the goods signed for by the master in the bill of lading, unless he can prove that the whole or some part of it was and is in fact not shipped. The *ratio decidendi* of that case was expressed by Lord Watson in the following passage of his judgment which was referred to by counsel for the plaintiff: —

"The rule of law applicable to this case appears to me to be settled beyond dispute. The master of a ship has no authority to grant bills of lading for goods which were not put on board his vessel; but, when he signs a bill acknowledging the receipt of a specific quantity of goods, the shipowner is bound to deliver the full amount specified, unless he can show that the whole or some part of it was in fact not shipped. If the owner

is able to satisfy that onus, by proving a short shipment, he is, to that extent, relieved from the obligation which would otherwise attach to him under the bill of lading, even in a question with an onerous holder."

On the evidence adduced in this case I found that the defendant, as a shipowner, had discharged the burden of proving that the goods in question were never in fact shipped on board the "S.S. Priam". The evidence of one Mr. James Perera, the Assistant Manager of the said Malaysian International Shipping Corporation Berhad, Penang (DW1) was to the effect that after the "S.S. Priam" had discharged its cargo at Penang, it was discovered that the goods in question were not on it. They instructed cargo tracers to trace the goods and were later informed that the said goods were still in the dock at New York and that they would be shipped on the "S.S. Peisander" which was expected to arrive in Penang on or about June 11, 1974. (See letter at page 15 of the agreed bundle of documents marked 'A'). The evidence of DW1 that the goods in question were never in fact shipped on board the "S.S. Priam" was not challenged in cross-examination and the plaintiff had in fact, through their solicitors, indicated that they were aware that the goods were never on board the vessel "S.S. Priam". (See paragraph one of the letter at page 24 of the agreed bundle of documents marked 'A'). There was also evidence to show that none of the goods in question were lost or stolen and that they were delivered by the defendant to the plaintiff who received them in June 1974. I therefore found on the evidence in this case and on the above-quoted authorities, that the defendant was not liable to the plaintiff in the circumstances and dismissed the plaintiff's suit with costs. As I had found that the defendant in this case was not liable, it was therefore not necessary for me to consider the arguments of counsel on the amount of damages, if any, recoverable if the defendant had been found liable.

Order accordingly.

Solicitors: *Presgrave & Matthews, Thillaimuthu & Phock Kin.*

HASHIM BIN ADAM v. DAYA UTAMA SENDIRIAN BERHAD

[O.C.J. (Mohamed Zahir J.) June 3, 1979]

[Kuala Trengganu — Civil Suit No. 91 of 1974]

Contract — Forest licence — Assignment or rights under licence — Whether a transfer of licence and therefore illegal — Restitution — Forest Rules, 1356, rr. 2, 5(i), 18 & 22 — Contracts Act, 1950, ss. 24 & 66.

Forestry — Forest licence — Assignment of rights — Whether transfer of licence and therefore illegal — Forest Rules, 1356, rr. 2, 5(i), 18 & 22.

In this case the plaintiff had obtained a forest licence. By an agreement between him and the defendants, it was agreed that the rights under the licence be assigned to the defendants, who should fell and remove the timber. The defendants did not carry out the terms of the contract with the result that the licence was cancelled. The plaintiff claimed $43,800 as damages. The defendants pleaded that the agreement was illegal, unenforceable and void.

Held: (1) the agreement in assigning the rights under the licence to the defendants was in effect a purported transfer of the licence which was prohibited by the Forest Rules and was therefore null and void;

(2) as both parties were aware that the licence was not transferable, no claim for restitution could be made.

Cases referred to:-

(1) *Tan Bing Hock* v. *Abu Samah* [1968] 1 M.L.J. 221.

(2) *Lo Su Tsoon Timber Depot* v. *Southern Estate Sdn. Bhd.* [1971] 2 M.L.J. 161.

(3) *Sundang Timber Co. Sdn. Bhd.* v. *Kinabatangan Development Co. Sdn. Bhd.* [1977] 2 M.L.J. 200.

(4) *Nam Seng & Co.* v. *Wing Yew (Tawan) Co. Sdn. Bhd.* [1978] 2 M.L.J. 198.

(5) *Chai Sau Yin* v. *Liew Kwee Sam* [1962] M.L.J. 152.

(6) *Menaka* v. *Lum Kum Chum* [1977] 1 M.L.J. 91.

CIVIL SUIT.

Mura Raju for the plaintiff.

Wong Fook Hin for the defendant.

Cur. Adv. Vult.

Mohamed Zahir J.: The plaintiff sues the defendant for a sum of $43,800 being damages arising from breach of a logging agreement dated July 31, 1973 entered between the parties.

Under the said agreement the defendant agreed among other things to completely fell and remove timber from a licensed area under Trengganu Forest Licence No. TR/PHNT. 77/73 in the District of Ulu Telemong, Ulu Trengganu under a licence granted to the plaintiff. The defendant was to pay the plaintiff $4 per forest ton of timber so felled and removed by way of tribute.

The plaintiff alleged that the defendant failed to honour the said contract and as a result the State Forest Officer cancelled the said forest licence. The sum of $43,800 claimed represents the premiums due to the Government before cancellation of the licence, tribute accruable had the timber been completely extracted and less advances taken.

The defence admits the transaction as pleaded by the plaintiff but denies the sum of $43,800 was due to the plaintiff. The defendant however did not plead as to the reason why they had failed to completely extract the timber although they admitted that they had felled about 1000 acres and removed 700 tons of timber. Their main defence is that the said agreement purporting to assign rights under the said licence was illegal, unenforceable and void, being in contravention of the provisions of Trengganu Forest Enactment No. 44 of 1356 and the rules made thereunder.

When the case came up for mention before me, both counsel agreed to make a written submission on the point of illegality or legality of the contract alone under Order 25 rule 2 of the Rules of Supreme Court. They both agree that the decision of the case rests entirely on the finding of the court on this point.

But I later discovered that the Forest Licence No. TR/PHNT. 77/73 was not included in the agreed bundle. I then caused the same to be photo-stated from the Forest Department and I asked both counsel whether they admit to the document including its contents. Both counsel agreed to the admissibility of the said licence and I accordingly included it in the agreed bundle of documents.